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IN THE

Supreme Court of the United States

October Term, 1954

No. 665

ARTHUR E. SUMMERFIELD, individually and as Postmaster General of the United States,

Petitioner,

—v.—

SUNSHINE BOOK COMPANY, SOLAIR UNION NATURISME, INC., COMMERCIAL DISTRIBUTORS, INC. and MARGARET BROTHERTON,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

Questions Presented

In the opinion of respondents the questions here presented are:

1. Whether the Act of August 6, 1950, c. 721, 64 Stat. 451, 39 U. S. C. A. §259a (Public Law 699, 81st Cong., 2d Sess.) (hereinafter sometimes referred to as 39 U. S. C. A. §259a or §259a), applies to the transmission through the mails of books, periodicals, magazines, and similar published documents.

2. Whether §259a authorizes an order affecting future, as well as past issues of a periodical.

3. Whether §259a, as here applied by the Postmaster General, usurps the exclusive power of the States and local communities concerning the offense of obscenity in violation of the Ninth and Tenth Amendments to the United States Constitution.

4. Whether §259a, as here applied by the Postmaster General, is a prior restraint upon the freedom of the press in contravention of the First Amendment to the United States Constitution.

5. Whether §259a, as here applied by the Postmaster General, imposes a penalty for the exercise of a right guaranteed by the First Amendment of the United States Constitution in violation of that Amendment.

6. Whether §259a, as here applied by the Postmaster General, is an unreasonable means of accomplishing the end sought by the Congress in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

7. Whether §259a, as here applied by the Postmaster General, is based upon a standard so vague and nebulous as to contravene the Due Process Clause of the Fifth Amendment to the United States Constitution.

8. Whether, under the doctrine of *American School* v. *McAnnulty*, 187 U. S. 94, §259a is inapplicable to respondents' publications.

9. Whether in the circumstances of this case the District Court below was entitled to determine for itself that respondents' publications were not obscene.

10. Whether there was any substantial evidence to sustain the judgment of the Postmaster General that respondents' publications are obscene.

Counter-Statement of the Case

The complaint and the affidavits submitted by respondents in support of their motion for an injunction stand unanswered, undenied, and uncontroverted. These establish the following (see J. A. 2-10):

Sunshine Book Company is a non-profit New Jersey corporation and is the publisher of a monthly periodical publication entitled "Sunshine & Health" which has had and has a wide circulation both nationally and locally and has been and is being distributed nationally to the forty-eight states both by means of the United States mails and interstate commerce. Sunshine & Health, which has been published and distributed continuously for more than twenty years, is an educational and cultural publication which contains discussions relating to various social ideas, including ideas relating to nudism.

Sunshine Book Company also published "The Story of American Nudism" on or about July, 1950, which was distributed and circulated throughout the United States after having been approved by the Post Office Department for third class or book-rate mailing. This publication, as Sunshine & Health, is devoted to discussions and advocacy of the nudist movement in the United States and is illustrated by appropriate photographs and other artistic displays.

Sunshine Book Company is, further, an agent for the distribution of the publication entitled "Nudist Herald", the official organ of Natural Communities, Inc., and of the Southwestern Sunbathing Conference, which publication is distributed throughout the United States and abroad and is devoted to discussions and advocacy by text and photographic illustration of the doctrine of nudism.

Solar Union Naturisme, Inc., is another non-profit New Jersey corporation and publishes a bi-monthly publication entitled "Sun", which is the official publication of the corporation. Solar is an international, interlingual, interracial association representing the naturist movement all over the world and all levels of nudist organizations,—individual, group, regional, national and international. Sun Magazine is the same type of publication as Sunshine & Health except that it is on an international scale.

Commercial Distributors, Inc., is a New Jersey stock corporation acting as a service agency for and on behalf of Sunshine Book Company and Solar performing services as an intermediary between Sunshine Book Company and Solar and ordinary distributors and other outlets for the publications.

Margaret Brotherton is an officer and employee of Commercial Distributors, Inc., and resides and is a citizen of Spring Lake, New Jersey.

Post Office Box BB at Spring Lake, New Jersey, is a box duly owned and paid for by Commercial Distributors, Inc., and used by it as a receptacle for the receipt of mail; Post Office Box 1000 at Mays Landing, New Jersey, is a box duly owned and paid for by the Outdoor Publishing

Corporation and used as a receptacle for the receipt of mail by Sunshine Book Company, Solar, and others.

In each of the publications pictures illustrate the text. The pictures show nudists in a normal and healthy environment, in the happy enjoyment of thoroughly innocent activities. They are the antithesis of anything suggestive or pornographic. Some of them are not without positive artistic merit and all of them present the human form in accordance with the conceptions of nudists as to the most harmonious relationship between human beings and the earth.

Sunshine & Health has been published and circulated, and distributed through the mails of the United States and abroad for a period of time in excess of twenty years. At no time during that period of publication, distribution and circulation have any of the publishers, distributors or recipients thereof been indicted or otherwise criminally charged with or convicted for its publication, circulation, distribution or receipt through the United States mails under any of the appropriate federal criminal statutes governing the circulation, distribution, or receipt through the United States mails of obscene, lewd. lascivious or fraudulent matter.

On or about September 23, 1952 the then Solicitor for the Post Office Department of the United States filed a complaint, allegedly pursuant to 39 U. S. C. A. §259a, alleging that the respondents therein named, including "Sunshine Book Co., Sunshine Book Company, Sunshine & Health, Solar Union Naturisme, Inc., and Solaire Universelle De Nudisme, at Mays Landing, New Jersey" were conducting an unlawful enterprise through the United

States mails in that they were said to be selling and offering for sale through the said mails the publications Sunshine & Health and Sun Magazine. The complaint recommended that the Postmaster General of the United States issue an order to the Postmaster at Mays Landing, New Jersey to dispose of mail addressed to, and money orders drawn in favor of the above-mentioned respondents, and their agents and representatives as such.

On or about December 4, 1952 the then Solicitor for the Post Office Department of the United States also filed a complaint, allegedly pursuant to 39 U. S. C. A. §259a, alleging that the respondents therein named, including "Commercial Distributors, Inc., M. Brotherton, and Post Office Box BB at Spring Lake, New Jersey, and Sunshine Book Company at Egg Harbor City, New Jersey, and Post Office Box 1000 at Mays Landing, New Jersey" were conducting an unlawful enterprise through the United States mails in that they were said to be selling and offering for sale through the same mails the publications The Story of American Nudism, Sun Magazine, and Sunshine & Health. This complaint recommended that the Postmaster General of the United States issue orders to the postmasters at Spring Lake, New Jersey, Egg Harbor City, New Jersey and Mays Landing, New Jersey, to dispose of mail addressed to, and money orders drawn in favor of the above-mentioned respondents, and their agents and representatives as such.

The respondents named in the complaint as aforesaid duly filed answers to the charges, and by agreement of the parties hearing on the two aforesaid complaints was consolidated and a hearing was conducted before the Hearing Examiner of the Post Office Department of the United

States on the aforesaid charges on or about February 16, 1953. At the hearing, by stipulation, there were received in evidence 25 issues of Sunshine & Health from the March, 1951 issue to and including the March, 1953 issue; 7 issues of Sun Magazine beginning with the January-February, 1952 issue and ending with the March-April, 1953 issue; the July, 1952 issue of Natural Herald; and the publication entitled The Story of American Nudism. Apart from the publications thus admitted in evidence by stipulation, the Post Office Department offered no other proof or evidence to sustain its charges against respondents as aforesaid.

At the hearing, the respondents offered to produce expert testimony relating to the issue of the charged obscenity of the publications for the purpose of proving that nudism and the advocacy of nudism by text and illustration as in the publications did not violate community standards of decency or morality, or accepted practices pertaining to nudism in the fields of art, science, biology, sociology, etc., and that the advocacy of nudism by text and picture as in the publications tended to improve rather than deteriorate or corrupt the morality of the readers of said publications. The motion of respondents to offer and introduce the aforesaid expert testimony was denied over their objection by the Hearing Examiner.

On or about March 27, 1953 the Hearing Examiner made his initial decision upon the charges and held that while the written material in the publications is not obscene, lewd, lascivious or indecent, some of the photographs therein contained of nude men and women were said to be objectionable within the meaning of 39 U. S. C. A. §259a

and it was concluded that the named respondents "are in violation of 39 U. S. C. 259a as charged in the complaint." The Examiner recommended an order for exeeeution by the Postmaster General of the United States for the denial of the use of the United States mail by the respondents for the receipt of any communications or transmittals through such mails. Pursuant to the applicable rules and regulations of the Post Office Department of the United States, respondents duly appealed from the aforesaid determination to the Postmaster General of the United States. On or about June 23, 1953, the Postmaster General, by decision and order of said date, concurred in the finding of the Hearing Examiner as aforesaid.

Thereupon respondents instituted the instant action for declaratory and injunctive relief. After argument before Judge SCHWEINHAUT on July 13, 1953 (J. A. 75-89), that Judge found that the publications "are not obscene", that they "do not fall within 39 U. S. C. A. Section 259(a)", and that "Accordingly, the Orders of the Postmaster General * * * are invalid" (J. A. 90-91). Appropriate injunctive relief was ordered (J. A. 90). From this determination the Postmaster General appealed (J. A. 92).

The Court of Appeals for the District of Columbia affirmed the District Court. Judge WASHINGTON, writing for the majority, answered in the negative the following issue:

> "Should this court then construe Section 259a to authorize the issuance of orders of indefinite duration which hamper or prevent the continuance of the publication and distribution of a magazine—with a substantial and admittedly innocuous text—because its past issues have been found to contain some

obscene illustrations, although none of its future issues may contain obscene matter within the meaning of the statute?"

Of orders issued by the Postmaster General pursuant to §259a, the Court of Appeals said:

> "They must be confined to materials already published, and duly found unlawful. Whether such limitation is practically possible, in cases like the present, is not for this court to determine. It may perhaps be argued that the sweeping orders here involved should be upheld * * * on the ground that from past unlawful conduct of appellees, as the Postmaster General sees it, he may conclude that such conduct will continue and that he will again have cause to find future issues of the magazines obscene. But there is and can be no finding now that any particular future issue of the appellees' magazines will be obscene and will provide a basis for the sanctions which the Postmaster General may impose under Section 259a. To let the present orders stand would permit the Postmaster General to prevent—in practical effect—the continued publication of a magazine without any advance knowledge that its future issues will be in violation of law, and thus to suppress putatively lawful activities. Grave constitutional questions would then be presented."

Judge DANAHER dissented on the grounds that:

> "Here, the court has nothing to do with the findings of the Postmaster General unless they are 'palpably wrong.' Here, that most of the scores of pictures in a score or more of exhibits are obscene seems to me as plain as the figures and the parts thereof depicted.
>
> I cannot believe that the First Amendment or any other amendment affords protection against pre-

vious restraint against publications, the pattern of which so clearly emerges from each separate issue. Thinking thus, I would have no difficulty in concluding that the government may as a matter of public policy withdraw the facilities to pander the obscenity condemned by the Congress. The enforcement of the statute has been committed to the Postmaster General. The trial judge erred in substituting his judgment for that of the duly designated officer and the order of injunction should be reversed."

ARGUMENT

I.

The writ should be denied.

The ruling of the Court of Appeals is premised on the proposition that an order which encompasses within its reach, willy-nilly, the lawful as well as the unlawful, particularly where the lawful activity is that protected by the First Amendment, must be bad and will not be deemed to be impliedly authorized by Congress. There is so little room for quarrel with this rationale, whether on authority or in reason, that we cannot see raised by that ruling an issue of the measure of importance necessary to warrant review by certiorari.

The free circulation through the mails of respondents' publications involves, of course, First Amendment considerations. *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146; *Stanard* v. *Olesen*, 74 S. Ct. 768. Petitioner's order would affect past issues of respondents' magazines not found unlawful, and future issues as to which there was not and

could not be any finding of illegality. The order, therefore, plainly is invalid, and unauthorized by §259a, pursuant to those many cases which establish that action directed at an evil resulting from First Amendment activity must be confined solely and exclusively to that evil otherwise it violates the Amendment. *Stromberg* v. *California,* 283 U. S. 359; *DeJonge* v. *Oregon,* 299 U. S. 353; *Herndon* v. *Lowry,* 301 U. S. 242; *Lovell* v. *Griffin,* 303 U. S. 444; *Schneider* v. *New Jersey,* 308 U. S. 147; *Thornhill* v. *Alabama,* 310 U. S. 88; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Carlson* v. *California,* 310 U. S. 106; *Thomas* v. *Collins,* 323 U. S. 516; *Winters* v. *New York,* 333 U. S. 507.

No aspect of the order of the Postmaster General affords it special exemption from the protection afforded First Amendment rights against the blunderbuss technique. Mr. Justice DOUGLAS said in *Stanard* v. *Olesen, supra,* at 770-771:

> "The power of the Post Office Department to exclude material from the mails and to intercept mail addressed to a person or a business is a power that touches basic freedoms. It might even have the effect of a prior restraint on communication in violation of the First Amendment, or the infliction of punishment without the due process of law which the Fifth and the Sixth Amendments guarantee. See the dissents of Mr. Justice Holmes and Mr. Justice Brandeis in *Leach* v. *Carlile,* 258 U. S. 138, 140, and *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson,* 255 U. S. 407, 417, 436; cf. *Hannegan* v. *Esquire, Inc.,* 327 U. S. 146. I mention the constitutional implications of the problem only to emphasize that the power to impound mail should not be lightly implied."

In *Donaldson* v. *Read Magazine,* 333 U. S. 178, 184, the majority observed as to orders like that here involved: "Such orders if too broad could work great hardships and inflict unnecessary injuries upon innocent persons and businesses." And of the related exclusion power of the Postmaster General for fraud, this Court wrote in *Reilly* v. *Pinkus,* 338 U. S. 269, 277:

> "Unlike the Postmaster General, the FTC cannot bar an offender from using the mails, an order which could wholly destroy a business. See Brandeis, J., dissenting in *United States ex rel., Milwaukee Social Democratic Pub. Co.* v. *Burleson,* 255 U. S. 407, 417 et seq. The strikingly different consequences of the orders issued by the two agencies on the basis of analogous misrepresentations emphasize the importance of limiting Postoffice Department orders to instances where actual fraud is clearly proved."

More particularly, as the Court of Appeals noted, *Donaldson* v. *Read Magazine, supra,* amply indicated this Court's attitude that orders under 39 U. S. C. §259 (and hence, §259a) must be limited to unlawful activities.[1] *Public Clearing House v. Coyne,* 194 U. S. 497, strongly relied

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1. Petitioner contends that the *Read Magazine* case is distinguishable because in that case the modified order was sustained as to future issues of the magazine. However, that modified order concerned only mail to the contest section and contest editors of the magazine; the contest was found to be fraudulent; and, accordingly, the mail barred was confined to the fraud, the initial perpetration of which was committed by past issues. As the Court said there, the modified order's "future effect is merely to enjoin the continuation of conduct found fraudulent" (333 U. S., at 191). In the instant case the future effect of the order under review would enjoin conduct as to which no finding of obscenity was or could be made.

on by petitioner, is not to the contrary, for the Court there noted:

> "* * * the Postmaster General only forbids the postmaster at Chicago to pay any postal money orders, drawn to the order of the League of Equity and the Public Clearing House, or their officers or agents in their capacity as such, and to inform the remitter of any such postal money order that payment thereof has been forbidden, etc., and to 'return all letters, whether registered or not, or other mail matter which shall arrive at your office directed to such concerns or their officers or agents as such, to postmasters at the office at which they were originally mailed.' There is nothing in the order thus worded that would authorize the postmaster at Chicago to return letters addressed to an individual unless addressed to such individual as officer or agent of the League of Equity or the complainants. There is nothing in this order that would authorize the interference with the private or domestic mail matter of individuals" (194 U. S., at 510-511).[2]

The petitioner has cited to the Court many dire consequences said to follow from the decision below. Of course the conduct complained of by petitioner is already the cognizance of federal and state criminal legislation. See, *e.g.*, 18 U. S. C. A. §1461. But this remedy is said by peti-

2. Similarly, in the many other cases involving Postmaster General fraud orders, the enterprise concerned and the mail received by it were apparently or presumptively devoted entirely to the fraud or lottery condemned by the Postmaster General. Consequently, in our view, no authority sustains the interpretation of §259a as applied by the Postmaster General herein, *i.e.*, the barring of mail concerning past or future issues not found obscene by the Postmaster General and addressed to persons or associations not necessarily or even presumptively involved with the issues obscene to the Postmaster General.

tioner "to be largely ineffective because the burden of proof upon the Government is quite properly heavy, * * * and criminal proceedings necessarily take time * * * " (p. 14). If these administrative inconveniences be put to one side, as they should out of deference to the rights intended to be safeguarded by the procedures the petitioner complains of, the evils envisioned by petitioner subside. And the supposed subversion by the Court below of §259a in various situations hypothesized by petitioner is rendered even more illusory when it is remembered that the decision of that Court is necessarily premised upon questions raised by the barring of mail to publishers of a periodical engaged in the exercise of rights, under the First Amendment, to advocate a cause.

If real, rather than supposed conjured evils be sought here, they are to be found in the following explicit assertion of petitioner to this Court concerning future issues of respondents' publications if his order be sustained:

> "If, however, it should be decided to change the character of the magazines, respondents are always free to apply for a new ruling by the Postmaster General" (p. 15).

Here is arrogation to the Postmaster General of censorship power in classic and pristine form. It is, of course, the position which must be ultimately assumed to uphold petitioner's order; this necessary consequence of petitioner's contentions, perhaps better than any other argument, demonstrates the validity of the ruling below.

II.

If the writ is granted, the questions considered by this Court should include various issues of constitutionality, statutory construction, and fact, anyone of which, if resolved in respondents' favor, would require an affirmance.

We have earlier set forth the questions we deem presented by the case. We do not urge the granting of the writ for the consideration of those questions; as indicated, we think the writ should be denied because the Court below was so plainly right. But we do respectfully submit to the Court that if the writ is granted on the issues raised by petitioner, then many other more serious and important questions are necessarily raised in order to make possible a complete disposition of the matter by the Court. Petitioner has reserved the right to argue those additional questions if certiorari should be granted (p. 11 n. 4), and we here only briefly adumbrate such issues in order that they not be overlooked in any circumstance.

As compared with other cognate federal legislation relating to punishment for and deterrence of the distribution of obscene publications through the United States mails [18 U. S. C. A. §§1461, 1462; 19 U. S. C. A. §1305(a)], §259a makes no explicit reference to books, magazines, periodicals or other published documents. Instead it refers only to tangible commodities in language such as Congress used when it intended to comprehend not publications such as respondents' magazines, but objects intended for an obscene or immoral use. Since §259a authorizes the imposition of devastating sanctions in connection with the property and constitutional rights of respondents to use the United States mails, that section should be literally and

strictly construed and pursuant to such construction deemed inapplicable in the circumstances of this case. Indeed, any other construction of §259a unnecessarily provokes very serious and grave constitutional questions.

In the event that it should be determined that §259a as is here applicable, then the statute is unconstitutional. In the first instance, there is no federal power in the area of obscenity which is an offense only as to a prescribed locality and definable only by the morality of such a locality. Moreover, §259a, as interpreted by petitioner empowers the Postmaster General to deny to respondents and other publishers, upon the basis of certain specific magazine issues, the use of the mails forever, whether in connection with the issues adjudged to be obscene or future issues not yet printed or seen by the Postmaster General. In this view of the Postmaster General's asserted power the statute authorizes a prior restraint upon the press—a restraint uniformly and consistently held to be in contravention to the First Amendment of the United States Constitution. Similarly, as upon the uncontroverted facts in the record herein respondents and their publications were engaged solely and exclusively in the sincere and legitimate advocacy of a cause, *i.e.*, nudism, the imposition of the penalties ordered by the Postmaster General was a violation of that First Amendment as a penalty upon the exercise of a guaranteed First Amendment right.

Section 259a as interpreted by the Postmaster General also runs afoul of the Due Process Clause of the Fifth Amendment to the United States Constitution. For it would authorize the Postmaster General to deny to respondents the receipt of mail or remittances which are and will be wholly unrelated to the particular issues adjudged

obscene by the Postmaster General. While this Court has in various instances sustained the constitutionality of fraud orders of a broad nature by the Postmaster General, an examination of those cases will disclose that the orders were in fact or presumptively narrowly confined to mail pertaining to the fraudulent enterprise which was the basis for the Postmaster General's action. In the instant case no such relationship exists and, accordingly, the statute as construed by the order constitutes an unreasonable and arbitrary means to combat the evil which Congress had in mind when it enacted §259a. Furthermore, since §259a, as interpreted by the Postmaster General, would authorize that executive officer to bar the use of the mails upon his finding that a publication is obscene, the statute is unconstitutional because it is predicated upon the term "obscenity" which, in the context of this statute, is so vague, nebulous and uncertain as to provide no reasonably objective standard of action, thereby committing to the personal subjective opinion of the Postmaster General the question whether the publication is obscene. The term "obscene", if definable at all, has meaning only as a reflection of the mores of a given culture or community. As such, the term "obscene" is too vague and nebulous for definition and objective enforcement. In any event, however capable of definition the word "obscene" may be in other statutory contexts, it is utterly undefinable in connection with §259a. For §259a does not involve any delimited community or culture, it applies to the Nation at large; and it is therefore impossible to ascertain the community which will provide a reasonably objective signification or definition of the term "obscene" in §259a.

Even if §259a were deemed applicable to published materials and constitutional if so applicable, nevertheless under the doctrine of *American School* v. *McAnnulty*, 187 U. S. 94, §259a does not authorize the action here taken by the Postmaster General. For that case establishes that orders such as the Postmaster General issued against respondents may not be based upon matters of opinion but only upon matters of provable fact. In the circumstances of this case it is clear that the action of the Postmaster General was based upon his opinion, not facts. For the Postmaster General acted solely and exclusively upon his reading of the publications and his opinion as to whether those publications complied with the public morality. He refused expert testimony and there was otherwise no proof or data upon which his determination was based.

Finally, we submit that the District Court was correct in determining that the publications here were not obscene. In view of the nature of the proceedings before the Postmaster General and the issues before him, it was appropriate for the District Court to determine for itself whether the publications were obscene; and under any view of the applicable rule of judicial review of administrative agencies the judgment of the District Court must be affirmed because there was no substantial evidence and indeed no evidence to sustain the finding by the Postmaster General of obscenity. The texts of the publications were concededly not obscene; and the illustrations were concededly properly and necessarily related to the text, and entirely consonant therewith. The single fact of the publication of pictures of nudes, where those pictures do not portray any objectionable activity and are not otherwise pornographic, con-

cededly does not constitute obscenity. For the publications to have been declared obscene in such circumstances was, therefore, neither warranted in fact nor in law.

CONCLUSION

The petition for a writ of certiorari should be denied; if granted, the questions considered should include the questions presented herein.

Respectfully submitted,

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